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Constitutional Law Process

LD 1437

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AUGUSTA, MAINE 04333

June 13, 1977

Honorable Richard A. Spencer  
House of Representatives  
State House  
Augusta, Maine 04333

Dear Representative Spencer:

This responds to your request for an opinion concerning the constitutionality of L.D. 1437, "AN ACT to Create a Landlord's Lien on Personal Property in Leased Premises in Event of Issuance of Writ of Possession or Abandonment by Tenant." L.D. 1437 establishes a procedure by which a landlord who obtains a writ of possession to leased premises, or whose premises are abandoned by a tenant, may obtain satisfaction for rent in arrears without invoking the machinery of the courts. The proposed statute enables a landlord to secure a lien against a tenant's personal property located in or on leased premises, and to liquidate such property at a private sale after sending thirty-days' written notice to the tenant's last known address.

You have correctly noted in your opinion request that the provisions of L.D. 1437 raise questions of constitutionality under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Specifically, two issues will be considered in this memorandum:

- 1) Whether L.D. 1437 accomplishes its purpose through the intervention of "state action" sufficient to trigger the protections of the due process clause.
- 2) Whether the procedures afforded by L.D. 1437 satisfies the procedural requirements of the due process clause.

It is our opinion that the operation of L.D. 1437 involves "state action" sufficient to invoke due process protections, and that the procedures established by L.D. 1437 do not satisfy the mandate of the Due Process Clause.

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At the outset, we note that the judicial process by which a landlord obtains a writ of possession to leased premises bears no necessary relation to the "state action" and procedural due process questions to be considered. L.D. 1437 creates a procedure which resolves the dispute between the landlord and tenant as to the fact and amount of rent due, whereas the judicial process from which a writ of possession issues adjudicates the question of who is entitled to possess the premises. We therefore assume that L.D. 1437 would permit a landlord to seize and ultimately sell the personal property of the tenant without guaranteeing to the tenant a right to a prior hearing on the fact and amount of rent alleged to be in arrears.

A landlord acting under the procedures of L.D. 1437 would be engaged in "state action" within the scope of due process protections because the State of Maine will have thereby delegated to such landlord distinct governmental powers usually reserved for the exclusive exercise by government departments. Parks v. "Mr. Ford", 45 U.S.L.W. 2500, April 4, 1977. The "state action" character of the landlord's action lies not so much in the attachment of the lien to the tenant's property, but in the unilateral execution upon and sale of the tenant's personalty by a landlord. The effect of such sale, without a requirement of posting bond, may be to irrevocably divest the tenant of his property. By so doing, the landlord acts as both interested decisionmaker, adjudicating the fact and the amount of the debt owed him, and enforcer of his decision. Brooks v. Flagg Brothers, 45 U.S.L.W. 2499, April 4, 1977, (UCC § 7-210, comparable to 11 M.R.S.A. § 7-210, violates Due Process Clause). These functions - adjudicator and enforcer of judgments - are essentially and respectively judicial and executive in nature. L.D. 1437, by delegating such governmental functions to the landlord, imparts a "state action" character to his actions. Parks v. "Mr. Ford," supra.

The unilateral sale provisions of L.D. 1437 serve to distinguish the proposed statutes from those approved by the courts in Davis v. Richmond, 412 F.2d 205 (1st Cir. 1975) and Anastasia v. Cosmopolitan National Bank of Chicago, 527 F.2d 150 (7th Cir. 1975), cert. den. U.S., 96 S.Ct. 1143 (1976). Your letter of request correctly notes that these two decisions, upholding boarding-housekeepers' and hotelkeepers' lien statutes respectively, are authority for the proposition that the attachment of a lien to a tenant's property is not ipso facto "state action." However, the courts in both cases considered only the lien attachment aspect of the procedure, and explicitly reserved judgment of the "state action" attributes of a unilateral execution and sale of a patron's personalty. Davis v. Richmond, supra, n. 5 at 204; Anastasia v. Cosmopolitan Nat'l Bank,

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supra, at 154. In making such a reservation, both courts implied that their "state action" determinations would be different had unilateral sales' provisions been in existence, Davis v. Richmond, supra, or before the court, Anastasia v. Cosmopolitan Nat'l Bank, supra.

Consistent with this analysis, one court has recently held that the attachment of a repairman's lien to a repaired car is not "state action," but that the statutory provision for sale of the vehicle after thirty days' notice to the owner of amount due is "state action" within the purview of the Fourteenth Amendment. Parks v. "Mr. Ford," supra.

A second, independent reason for finding "state action" in the provisions of L.D. 1437 is that the proposed statute has a substantial "impact on the private ordering" of the landlord-tenant relationship. Burke & Reber, "State Action, Congressional Power, and Creditor Rights," 47 S.Cal.L.Rev. 1, 47 (1973) quoted in Davis v. Richmond, supra, at 204. L.D. 1437 effects a significant expansion in the common law prerogatives of the landlord. Under common law, a landlord is entitled to seize and hold a tenant's property as leverage for payment of rent past due, but is not authorized to sell such property until judgment by the court. Santiago v. McElroy, 319 F.Supp. 284, 286 (E.D. Pa. 1970). In contrast, L.D. 1437 enables the landlord to convert a tenant's property to his own by sale without a court's ever passing on the validity or amount of the tenant's indebtedness. Likewise, under present statute, a landlord must commence an action, and after notice and hearing, attach the property of the tenant in order to secure the latter's property for payment and rent. 14 M.R.S.A. §§ 6010, 4151 et seq. Under L.D. 1437, a landlord may encumber and liquidate a tenant's property by a mere unilateral, extra-judicial action.

These factors establish that L.D. 1437 does more than merely "clarify" the legal relationship between landlord and tenant. The magnitude of the changes effected by L.D. 1437, and in particular, its dispensation of the necessity for an impartial hearing on the validity of indebtedness, raise an inference that the purpose of its enactment would be "so that the state could avoid its obligations under the Fourteenth Amendment." Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976) (UCC § 7-210 upheld). Such an inference would support a finding of state action in the very enactment of the statute. Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitutional amendment proscribing laws restricting discrimination in the sale of property involved in "state action").

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We also note that various courts using differing modes of analysis have also found "state action" operative in the landlord lien laws of various states. Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Barber v. Rader, 350 F.Supp. 183 (S.D.Fla. 1972); Holt v. Brown, 366 F.Supp. 2 (W.D. Ky. 1971); Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975).

Having established that the due process protections of the Fourteenth Amendment are applicable to the "state action" effected by L.D. 1437, we may quickly dispose of the question of the proposed statute's constitutionality. Because the procedures envisioned by L.D. 1437 do not require a prior hearing before an impartial adjudicator before the deprivation of the tenant's personal property becomes final, and do not provide the tenant with judicial\* protection against the wrongful claims of a landlord, L.D. 1437 does not satisfy the constitutional requirements of due process. Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W. T. Grant, 416 U.S. 600 (1974); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

In your letter of request, you have cited various provisions of the Maine Revised Statutes which provide for the non-judicial attachment and execution of creditor's liens on debtor's property similar to the procedures established by L.D. 1437. As noted above, UCC §§ 7-209, 7-210, upon which 11 M.R.S.A. §§ 7-209, 7-210 are based, has been upheld by a federal circuit court of appeals, and struck down by another. Compare Melara v. Kennedy, supra, with Brooks v. Flagg Brothers, supra. Concerning the constitutionality of provisions for private sale by creditors of property subject to carrier's liens, (11 M.R.S.A. § 7-308), security interests (11 M.R.S.A. §§ 9-503, 9-504), repairmen's liens, (10 M.R.S.A. § 3951-52), and innkeepers' liens (30 M.R.S.A. §§ 2951-52), we reserve comment for the present. We observe, however, that more stringent tests of "state action" have been applied by the courts in situations where there is a close nexus between the property seized and the debt giving rise to the lien. Melara v. Kennedy, supra, at 808.

Sincerely,

JOSEPH E. BRENNAN  
Attorney General

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\* As the matters at issue involve private property rights, not enforcement of regulatory statutes, judicial, rather than impartial administrative, protection may be required. Cf. Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm., 97 S.Ct. 1261 (1977).